No. 97-475

Supreme Court, U.S.
FILED
AUG 31 1998
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

EL AL ISRAEL AIRLINES, LTD.,

Petitioner,

—v.—

TSUI YUAN TSENG,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner EL AL respectfully submits its reply to the brief in opposition of Respondent Tsui Yuan Tseng.

REPLY TO COUNTER-STATEMENT OF THE NATURE OF THE CASE

Tseng was escorted into EL AL's private security room because her responses to questions posed by EL AL security led to the determination that she fit a "high risk" passenger profile.[1] (JA 7, R.31, Tr. 69-70; JA 3, R. 10, Ex. E. at 24-31, 57-58; JA 22 & 23). EL AL did not at any time request Tseng to remove her underclothing, jeans, t-shirt or socks. (JA 7, R. 31, Tr. 41-43, 62). Any contrary inference which Tseng attempts to create should be dismissed. Moreover, EL AL has never conceded "imprisonment." (R. Br. 1).[2] It is Tseng who conceded that she did not at any time object to the search, and

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[1] References to the Joint Appendix are indicated as "(JA ___)."

[2] References to Respondent's Brief in Opposition are indicated as "R. Br. ___."

that she never requested to leave the room. (JA 7, R. 31, Tr. 47-48).[3] At trial, Tseng testified that the questioning and physical search lasted approximately 10-15 minutes. (JA 7, R. 31, Tr. 18-19).

ARGUMENT

I

A FAITHFUL READING OF THE CONVENTION COMPELS THE CONCLUSION THAT THE CAUSE OF ACTION UNDER ARTICLE 17 IS EXCLUSIVE

A. The Court Should Uphold And Give Effect To The Interrelationship Of The Articles Under The Liability Chapter Of The Convention

Tseng reads Article 17 out of context and erroneously dismisses the all-encompassing language of Article 1, which expressly defines the scope of the Warsaw Convention[4] as applying to *all* international transportation by air.[5] Tseng isolates words and phrases within Articles 17, 24 and 25 to

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[3] Thus, based on Tseng's own testimony and irrespective of whether EL AL explicitly advised Tseng that she could forego the transportation if she did not wish to consent to the search, Tseng is unable to meet state law prerequisites to recovery. (JA 9, Brief for Defendant-Appellee-Cross-Appellant 21-24).

[4] Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in* 49 U.S.C.A. § 40105 (1997) (note).

[5] Tseng also contends that because the title of the Convention states that it is to apply only to "Certain Rules," intentional tort causes of action are available to provide her with a remedy where, as here, she indisputably cannot establish one under the Convention. (R. Br. 21-22). This reasoning is inconsistent with (1) Article 1, which unambiguously states that the Convention applies to all international transportation; (2) Article 24, which states that actions for damages arising out of such transportation "can only be brought" under Articles 17, 18 and 19;

support her plea in equity, and disregards the scope, structure and provisions of the Liability Chapter of the Convention, which expressly define carrier liability as a matter of law.

1. Failure to satisfy the substantive conditions to liability under Article 17 does not create a "pass-through" to state law

The finding of an accident within the meaning of Article 17 is one of two conditions precedent (the other being bodily injury) to any right of recovery for a personal injury claim against a carrier arising in the course of "international transportation." *See* Pet. Br. 17-18; US Br. 16-21; IATA Br. 4, 10; ATA Br. 22-23.[6] The Court already has held that the Convention does not provide for a right of recovery in the absence of bodily harm (*Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 552 (1991)); the Court likewise should reject Tseng's contention that the failure to establish an Article 17 accident[7] as the cause of a passenger's injury makes the Convention inapplicable to the passenger's claims and permits recourse to state law.

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and (3) Articles 2(2) and 34, which state the three *exceptions* to Article 1. *See* Petitioner's Brief on the Merits 10-11 (hereinafter indicated as "Pet. Br. __").

[6] The Brief submitted by the Solicitor General of the United States is indicated as "US Br. __"; the *amici* briefs submitted by the International Air Transport Association and the Air Transport Association of America are indicated, respectively, as "IATA Br. __" and "ATA Br. ___".

[7] Petitioner has not conceded that the security search of Tseng fails to meet the "accident" condition within Article 17. *Compare* R. Br. 13; US Br. 18. EL AL has consistently preserved its position that the search may be considered an "accident." *See Tseng v. EL AL Israel Airlines, Ltd.*, 919 F. Supp. 155, 157-58 (S.D.N.Y. 1996), *aff'd in part and rev'd in part*, 122 F.3d 99, 103-04 (2d Cir. 1997), *cert. granted in part*, 118 S. Ct. 1793 (1998). However, because Tseng fails to meet the "bodily injury" condition within Article 17, the "accident" issue need not, but may, be addressed by the Court to decide the question presented. *See Procunier v. Navarette*, 434 U.S. 555, 559 n.6 (1978).

Tseng, in part, bases her argument on a misapplication of the holding in *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996). The Court in *Zicherman* concluded that Article 24 acts as a "pass-through," a direction to apply the law of the forum to the questions of who may bring suit and the types of damages for which they may be compensated. *Id.* at 229. Article 24 does not direct a "pass-through" for those instances when the substantive conditions to liability under Articles 17, 18 and 19 cannot be met.[8] In short, *Zicherman* recognizes that the text permits derogation from the Convention's goal of uniformity only where expressly stated.[9] The Court should reject Tseng's argument (R. Br. 21) that Article 24(2) is a means to evade the substantive rules of liability under Article 17. *See, e.g., In re Air Crash Near Cali, Colombia on Dec. 20, 1995*, 985 F. Supp. 1106, 1153 (S.D. Fla. 1997) ("[The *Floyd*] holding was not disturbed by *Zicherman*, and supports the view that the Convention operates as a 'pass-through' with respect to damages only where it does not embody a particular 'rule of law' on the recoverability of the damages in question.").

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[8] The clause "respective rights" in Article 24(2) was borne out of the drafters' desire to address issues of standing and the respective rights of beneficiaries regarding descent and distribution in a death action. *See* Pet. Br. 22-23, 32-34; *see also Second International Conference on Private Aeronautical Law Minutes* 255 (Robert C. Horner & Didier Legrez trans., 1975) ("*Warsaw Minutes*"); *Potter v. Delta Air Lines, Inc.*, 98 F.3d 881, 886 (5th Cir. 1996); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1488 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991); *In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, 928 F.2d 1267, 1282-85 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991).

[9] Contrary to Tseng's persistent belief that the Court de-emphasized and essentially found irrelevant the goal of uniformity prevalent throughout the Convention (R. Br. 22-26), *Zicherman* noted: "Undoubtedly it was a primary function of the Warsaw Convention to foster uniformity in the law of international air travel . . . ." 516 U.S. at 230; *see also* Pet. Br. 11-13; *Warsaw Minutes* at 85 ("The object of this Convention is to insure uniformity of law . . . .").

2. The drafters intended Article 24 to apply to all claims for injury in the course of international transportation, irrespective of whether there is a right of recovery under Article 17

Reading the Convention as exclusive comports with the text of the treaty, the goals of the drafters in 1929, the drafting history, the subsequent conduct of the contracting nations and the reading of a sister signatory. (Pet. Br. 8-42). Article 24 plainly provides that the cause of action for death or personal injury can only be brought subject to the terms and conditions of the Convention. (Pet. Br. 13-23).[10] Because those terms and conditions do not provide a right of recovery, Tseng is not entitled to monetary relief.[11]

The drafting history of Articles 17 and 24 confirms the drafters' intention that Article 24 "cover" all personal injury claims arising in the course of international transportation. (Pet. Br. 34). Tseng chooses to dismiss (R. Br. 10) the direct, unequivocal and perhaps most salient statement regarding Article 24 at the Warsaw Conference, that the drafters intended to have the Convention serve as the exclusive basis for a cause of action arising within the course of international transportation. (Pet. Br. 35). Moreover, the drafters unanimously rejected (save the Japanese delegate) the Japanese proposal to permit national legislation creating

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[10] *Compare Dooley v. Korean Air Lines Co.*, 524 U.S. ___, 118 S. Ct. 1890, 1895, 141 L. Ed. 2d 102, 109 (1998) ("Congress . . . precluded the judiciary from enlarging either the class of beneficiaries or the recoverable damages" in a Death on the High Seas Act case).

[11] Tseng and the lower court erroneously read the "in the cases covered by" language in Article 24 to mean that a claim is not "covered" by Article 17 unless the passenger has a right of recovery under Article 17. *See* R. Br. 20-22; *Tseng*, 122 F.3d at 104-05. The Warsaw delegates used the phrase to distinguish liability for personal injury and death from damage to or loss of cargo and baggage because an earlier draft of Article 24 inadvertently neglected to reference cargo and baggage. *See Warsaw Minutes* at 212-13; *see also Jack v. Trans World Airlines, Inc.*, 820 F. Supp. 1218, 1225 (N.D. Cal. 1993).

exceptions to the now Article 23, which declares null and void laws to limit or exclude liability *other than as provided for by the Convention*. The British delegate commented:

> As regards the British Government, the sole reason which it has for entering into this Convention is the desire to achieve uniformity. If the conference adopts the point of view of Japan, we miss the point. The draft of the Convention is contrary, on several points, to our laws and to our customs, but we have decided to make sacrifices to obtain this uniformity.

Warsaw Minutes at 35-36; *see also id.* at 234 ("[I]f the Convention is not one, it will no longer exist. . . . [A] Convention which unifies certain rules cannot include reservations which interfere with precisely this unification."). *Accord Abnett v. British Airways plc*, [1997] 1 All E.R. 193 (H.L. 1996) (U.K.) (Pet. App. 65a) ("A balance was struck, in the interests of certainty and uniformity.").

The Convention created the first set of liability rules governing international air carriage. *See generally Warsaw Minutes* at 11-13. With this fundamental premise in mind, it is not absurd to read this treaty as providing the exclusive right of action and precluding liability altogether in cases such as the one before the Court.

3. Article 17 does not differentiate between harm resulting from accidental versus intentional acts

Article 17 requires as a prerequisite to presumptive[12] liability that an "accident" cause a passenger's injury. *See Floyd*, 499 U.S. at 535-36; *Saks*, 470 U.S. at 398. Respondent, applying a common law negligence analysis, misconstrues the term "accident" in Article 17 as equivalent to the

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[12] The Convention as drafted in 1929 created presumptive liability on the part of the carrier. To characterize the liability as "absolute" "is not entirely accurate." *Air France v. Saks*, 470 U.S. 392, 407 (1985).

term "accidental"[13] and as distinct from "intentional." (R. Br. 11-20). Article 17, however, does not support such a distinction. Article 17 provides that one of the conditions to a right of recovery is that the "passenger's injury is caused by an unexpected or unusual event . . . ." *Saks*, 470 U.S. at 405. Where, however, that event was the result of the carrier's wilful misconduct,[14] the passenger looks to Article 25 to obtain compensatory damages unhampered by Articles 20, 21 and 22. *See, e.g., Korean Air Lines Disaster*, 932 F. 2d at 1488-89.

Notwithstanding the express language of Article 25, Tseng attempts to read an exception to liability under Article 17 where "scienter" is alleged. (R. Br. 12, 24, 35). *Saks* does not support Tseng's scienter argument. The Court, in *Saks*, looked to historical interpretations of "accident" and noted that a 1903 British case observed that "an accident means any unintended and unexpected occurrence which produces hurt or loss." *Id.* at 398. The Court also reviewed French cases and dictionaries to conclude that, when "accident" is used to describe a cause of injury, "it is usually defined as a fortuitous, unexpected, unusual, or unintended event." *Id.* at 399-400 (citations omitted).

In reaching the definition of "accident," the Court in *Saks* did not emphasize the "unintended" qualification advocated by Tseng, but rather surveyed the myriad meanings of "accident," including its use in the text of the Convention, to arrive

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[13] Tseng inappropriately relies on several cases interpreting the term "accident" in insurance policies. *See* R. Br. 16 n.15; *see also* US Br. 18 n.11.

[14] Tseng repeatedly characterizes her claim as a "willful tort" in a futile attempt to avoid the words of Article 25—"wilful misconduct." However, Article 25 may not be invoked where the substantive conditions to Article 17 liability are not met (a finding of the lower court which Tseng did not seek to review). Furthermore, Tseng did not even raise Article 25 in her opposition to the petition for writ of *certiorari* (*see* US Br. 18 n.10) or file a cross-petition.

at a definition which repeatedly stressed that the "event"[15] must be "unexpected" and "unusual" to give rise to potential liability under Article 17. *Id.* at 400, 405 & 406.[16] The gravamen of the *Saks* decision is that the injury causing conduct should be viewed in an objective manner as creating an unexpected or unusual event.

Moreover, the Court in *Saks* recognized that the definition of "accident" has been applied to include torts, such as terrorist attacks, which cannot properly be characterized as accidental. 470 U.S. at 405. Article 17 may not properly be limited to conduct which only correlates with some gradation of negligence, but stopping short of "scienter".

B. Article 25, By Its Terms, Cannot Stand Alone

If Tseng cannot satisfy the conditions to recovery for her personal injury action under Article 17, either because her alleged injuries were not the result of an accident within the meaning of Article 17 (according to the court below) or because she did not sustain bodily injury (an undisputed find-

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[15] The courts have refrained from using the term occurrence to define an Article 17 "accident" in light of the use of the term "occurrence" in Article 18. *See Saks*, 470 U.S. at 398; R. Br. 18. Regrettably, there is no discussion in the drafting history to elucidate whether the distinction was intentional or inadvertent. Interestingly, however, two of the French definitions for "accident" were "accident" and "occurrence." *See* Pet. Br. 18 n.17 (quoting The Concise Oxford French Dictionary 8 (1934)). Perhaps the syntax reflects a distinction between harm to passengers and damage to goods and baggage—passengers sustain injuries as the result of accidents, not occurrences; cargo damages occur in the absence of an accident (*e.g.*, partial loss or spoilage). *See also Warsaw Minutes* at 205 (recognizing that damaged or lost cargo and baggage "are entirely different liability cases" from "death or wounding"). *Accord id.* at 80 ("Goods don't enter [an aerodrome] if they are not carried!").

[16] Furthermore, *Potter* never referred to the incident in that case as an "unintended occurrence." (R. Br. 24). The Fifth Circuit held that the incident was not an "unexpected *event* external to the passenger." 98 F.3d at 884 (emphasis in opinion) (quoting *Saks*, 470 U.S. at 406).

ing by the trial court), the Convention does not permit Tseng to create a parallel action under Article 25. *See* R. Br. 29, 35-36; *see also Tseng*, 122 F.3d at 104. Tseng does not dispute that her emotional distress arose during the course of international transportation. Rather, she attempts to avoid the Article 17 question presented to the Court by characterizing EL AL's security search as a "willful tort."

1. Article 25 is given meaning by reading the preceding articles in the Liability Chapter

A proper construction of the Warsaw Convention compels the conclusion that if, and only if, Article 17 permits recovery may the trial court advance to the next questions—exonerated (Article 20), mitigated (Articles 21 and 23), limited (Article 22) or unlimited (Article 25) liability. *See* Pet. Br. at 25-26 (setting forth the liability scheme of the Liability Chapter of the Convention). The intentional (or "wilful" as stated in Article 25) misconduct of a carrier subjects the carrier to liability for compensatory damages without limit *only* where there is a right of recovery under Article 17, 18 or 19. As explained by the lower court:

> The two articles [17 and 25] are not mutually exclusive; rather the finding of an "accident" under Article 17 is a prerequisite to the imposition of any liability for the personal injuries of a passenger. . . . Article 25 simply describes a subset of "accidents" that are more egregious and to which a greater degree of culpability attaches.

Tseng, 122 F.3d at 104 (citations omitted); *see also Li v. Quraishi*, 780 F. Supp. 117, 119 (E.D.N.Y. 1992) ("Article 17 and Article 25 . . . must be construed together in order to understand the issue" of carrier liability for wilful misconduct).

Respondent's reading of the Convention wrongly advocates isolated consideration of Article 25, without reference to the

other provisions of Chapter III, the Liability Chapter of the Convention. Article 25 is triggered only "if *the damage* is caused by [a carrier's] wilful misconduct." 49 Stat. at 3020 (emphasis added). To determine the origin of *the damage*, the reader necessarily must look to the liability-creating articles (*i.e.*, Article 17, 18 or 19). In other words, the express reference to *the damage* in Article 25 is given meaning by virtue of the creation of liability within Articles 17, 18 and 19—"The carrier shall be liable for damage . . . ." 49 Stat. at 3018, 3019.

The regulation of the liability created by Articles 17, 18 and 19 is evident by reference to the use of the "damage" term under other provisions within the Liability Chapter. The "damage" referenced in Articles 17, 18 and 19 is "the damage" for which Article 25 may provide recovery without limit. Conversely, under Articles 20(1) and 21, the carrier may avoid or limit liability for Article 17, 18 or 19 "damage." If, however, the conditions, limits or exceptions of Article 20, 21 or 25 do not apply. Article 22 limits the "damages" recoverable under Article 17, 18 or 19.

Thus, Tseng's attempt to excise Article 25 from Article 17 should be rejected. *See Lockerbie*, 928 F. 2d at 1286 ("Article 25 only refers to terms within the Convention.").

2. Article 25 does not create an independent cause of action, but rather permits recovery of compensable damages without limit when the carrier's conduct is the "equivalent" of wilful misconduct

The plain language of Article 25 does not create an independent cause of action as contended by Tseng. (R. Br. 29, 33-36). *See Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1483 (11th Cir. 1989), *rev'd on other grounds*, 499 U.S. 530 (1991) (rejecting plaintiffs' argument that in addition to removing the limitation on compensatory damages, Article 25 also creates a cause of action authorizing recovery of

punitive damages). The Eleventh Circuit in *Floyd* properly concluded:

> The structure of the Convention, the subsequent interpretation by parties, and the unanimous case law persuade us that Article 25 operates only to remove the liability limitations of Article 22 in cases of "willful misconduct" by the air carrier, and was not intended to provide an independent right of action.

872 F.2d at 1483.

Tseng misinterprets Article 25's express reference to "the law of the court to which the case is submitted." (R. Br. 34). "[T]he only reasonable construction of Article 25's reference to the law of the forum jurisdiction is deference to that law for the purposes of defining 'dol' or 'wilful misconduct.' " *Brink's Ltd. v. South African Airways*, 93 F.3d 1022, 1028 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 959 (1997).[17]

Tseng's alternative argument, that Article 17 qualifies as one of the provisions that "exclude" or "limit" liability under Article 25 (R. Br. 36), is nonsensical. Article 17 *includes* the only basis for liability for bodily injury.[18] Plainly, Articles 20, 21 and 22 provide potential limits on the liability created by Article 17 (*see Korean Air Lines Disaster*, 932 F.2d at 1488-89; *Lockerbie*, 928 F.2d at 1285-86), and Article 25 is " 'most reasonably interpreted as [an] exception[ ] to the limitations on the recovery of *compensatory* damages within the Convention . . . ." *Korean Air Lines Disaster*, 932 F.2d at 1489

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[17] The Second Circuit's construction is both reasonable and supported by the drafting history. The drafters could not devise a uniform rule regarding liability of a carrier for the acts of its employees and, thus, made express the application of local law to this discrete issue. *Id.* at 1029; *see also Warsaw Minutes* at 62-66.

[18] Tseng confuses the "rights" which are to be expanded under *De Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) and *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 163 (1940). (R. Br. 9, 27, 28, 36). It is only the rights provided by the treaty which fall within the parameters of this rule of treaty construction. (Pet. Br. 20 n.23).

(quoting *In re Air Crash Disaster at Gander, Newfoundland on Dec. 12, 1985*, 684 F. Supp. 927, 932 (W.D. Ky. 1987) (emphasis in original)). *Accord Lockerbie*, 928 F.2d at 1285-86; *Floyd*, 872 F.2d at 1484.[19]

3. The drafting history confirms that Article 25 may, in certain circumstances, void the limits and conditions of liability in the actions created by Articles 17, 18 and 19

The evolution of the text of Article 25 substantiates that any action arising from an "illicit act" on the part of the carrier must be based on the Convention. Reading seriatim the 1928 CITEJA draft,[20] the draft presented at the Warsaw Conference[21] and the present language of Article 25 demonstrates the drafters' intent:

Article 26 [Third Session of CITEJA]	In case of accident, loss, damage or delay, the liability action may not be brought against the carrier except on the basis of this convention, *unless the damage arises through an intentional unlawful act as to which he bears the liability; in such case, he shall not have the right to avail himself of the provisions of this convention which exclude in whole or in part his direct liability* or that derived from the errors or omissions of his servants or agents.

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[19] If Article 25 were read to create a right of recourse to state liability law, that state's damages law surely also would apply (including potentially the right to recover punitive damages, contrary to *Korean Air Lines Disaster, Lockerbie* and *Floyd*). This construction of Article 25 would run afoul of the entire compensatory damage scheme of the Convention. *See also Zickerman*, 516 U.S. at 225-28.

[20] G. Nathan Calkins, Jr., *The Cause of Action Under the Warsaw Convention*, Part I, 26 J. Air L. & Com. 217, 221-23 (Summer 1959) (preliminary draft of convention at outset of Third Session) (emphasis added) ("Calkins, Part I").

[21] *Warsaw Minutes* at 265-66 (emphasis added).

Article 24 [presented at Warsaw]	In the cases provided for in Article 21 [now Articles 17, 18 and 19] . . . . *If the damage arises from an intentional illicit act for which the carrier is responsible, he will not have the right to avail himself of the provisions of this Convention, which exclude in all or in part his direct liability* or that derived from the faults of his servants.
Article 25(1) [Warsaw Convention]	The carrier *shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct* or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct. 49 Stat. at 3020.

The predecessor drafts to Article 25 cross-referenced the provisions which exclude or limit a carrier's liability (Articles 20, 21 and 22) for an accident, occurrence or delay (Articles 17, 18 and 19). The drafting history also shows that a finding of an "intentional unlawful act" or "intentional illicit act" or "wilful misconduct" was intended only to preclude a carrier from limiting the liability created by Articles 17, 18 and 19, the three "most important articles of the Convention." *Warsaw Minutes* at 205. Article 25 was never intended to create an alternative source for carrier liability, but rather to free the claimant from the confines of Article 22 in cases where the substantive conditions to liability under Article 17, 18 or 19 are met.

C. Petitioner's Construction Of Articles 17 And 24 Is A Faithful Reading Of The Convention

In her effort to discredit the natural reading of the Convention, Tseng resorts to hyperbole and equity-based arguments and disregards the construction intended by its drafters.

See, e.g., R. Br. 5-11. The Court, however, should give effect to one of the indisputable purposes behind the drafting of the Warsaw Convention—to create carrier liability where none existed (subject to prescribed terms and conditions), a just and equitable endeavor in 1929.[22] Although courts may be tempted to impose common law theories or reasoning to this treaty, which is based on the "French law of contractual liability" (Calkins, Part I at 223), the temptation must be resisted to uphold the contract of carriage as intended by the Convention's drafters. *See also* Pet. Br. 18 n.18, 22-23. "Whatever may be the current view among Convention signatories, in 1929 the parties" concerned themselves more with limiting the liability of carriers in order to "foster the growth of the fledgling commercial aviation industry" than with providing a full recovery to passengers for any and all claims arising during international transportation by air. *Floyd*, 499 U.S. at 546.

The Convention was intended to and does, in fact, under certain circumstances deprive passengers who sustain injury in the course of international transportation of a contractual right of recovery. Indeed, passengers that have ostensibly experienced emotional distress in graver circumstances have been denied a right of recovery under the Convention. *See, e.g., Floyd*, 499 U.S. at 533 (passengers informed that

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[22] The British delegate, when advocating to exonerate a carrier from passenger liability for the errors of the pilot (a position ultimately rejected by the delegates), noted:

> In the Convention[,] we propose to replace a system of free contract by a system of law, of regulation, of by-laws. My Government feels that these rules must be of such a nature that they can appear in a just, equitable contract between equal parties placed upon equal footing.

Warsaw Minutes at 42; *see also id.* at 48 (cited in petition for writ of *certiorari* at 12 n.8). The construction favoring exclusivity is just and equitable—a carrier's presumptive liability to a passenger who sustains bodily harm is a trade off for omitting liability in cases of non-corporal harm, as aptly termed by *amicus* IATA (IATA Br.13).

plane "would be ditched in the Atlantic Ocean" because of engine failure denied any recovery for purely mental injuries); *Li*, 780 F. Supp. at 118, 120 (claims for "severe emotional and psychological damage" of mother and her child arising out of fellow passenger urinating on the child dismissed). However antithetical to the common law principles which have developed since 1929, the Court should uphold the provisions of this treaty, even if there may not be a remedy for every alleged wrong.

The most natural reading of the Convention is that the drafters intended there to be no recovery for non-corporal or non-accident claims, irrespective of whether a carrier's conduct is the equivalent of wilful misconduct. According to Tseng's illogical construction of the Convention, two passengers both claiming only emotional distress would have differing results depending on whether the harm was the result of an Article 17 accident. If the injury was not the result of an Article 17 accident (*Tseng*), the passenger may be entitled to recover unlimited damages under state law, but if the harm was the result of an Article 17 accident (*Floyd*), the passenger is not entitled to any recovery. This is the true "illogical result," the result advocated by Tseng, and the ultimate consequence if the Court were to affirm the lower court's decision.

Circumvention of the treaty in a judicial effort to ensure a remedy for every wrong (real or imagined) results in a tortured application of the Convention and eviscerates the rule of uniformity of international air carriage liability law. The decision of the court below must be reversed to uphold this treaty as intended by its drafters—uniform application of the law of carrier liability in international transportation by air.

II

THE WARSAW CONVENTION PREEMPTS THE FIELD PRESCRIBED BY ARTICLE 1

Tseng is misguided in her application of federal preemption case law, and the cases she has cited do not address international treaties.[23] *See* R. Br. 31-33. The Court has recognized the following bases for federal preemption: (1) Congress can expressly provide for preemption within the federal law (*e.g.*, *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977));[24] (2) preemption may be implied where the federal law is so pervasive as to leave no room for supplementary state regulation (*e.g.*, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988)); *or* (3) the state regulation may be displaced where it conflicts with or frustrates the federal law (*e.g.*, *Boggs v. Boggs*, 520 U.S. 833 (1997)).

The Court further has recognized that, unlike a federal statute, a treaty is "solemnly adopted by the governments of many separate nations" (*Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989)), and its construction by sister signatories is " 'entitled to considerable weight.' " *Saks*, 470 U.S. at 404 (citation omitted). The Court thus takes into consideration the international stature of a treaty, and state law yields when it is inconsistent with or impairs the policy or provisions of a treaty. *See United States v. Pink*, 315 U.S. 203, 231-32 (1942). "A treaty cannot be the supreme law of the land, that is of all the United States, if any act of a state Legislature can stand in its way." *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236 (1796); *see also* U.S. Const. art. VI, cl. 2. *Accord*

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[23] Although not addressed by the district court or the court below, federal preemption law is "fairly comprised in" the question presented and, therefore, may be addressed by the Court. *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980).

[24] It is axiomatic that the Warsaw Convention does not contain an express enabling clause that it "supersedes" state law. *Compare Rath Packing Co.*, 430 U.S. at 538-40.

Restatement (Third) of Foreign Relations Law § 115 cmt. e (1987) (the Supremacy Clause implies that a treaty or international agreement may be held to occupy a field, preempt a subject and supersede state law or policy).

State law is preempted by the Convention, by virtue of the express language of Article 1(1), which states:

> This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

49 Stat. at 3014. Accordingly, the Court should hold that the Convention preempts the whole field defined by Article 1. The field affects the "equilibrium in our foreign relations" and, thus, "any state power which may exist 'is restricted to the narrowest of limits.' " *Pink*, 315 U.S. at 232 (citation omitted); *see also Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968) (even if state statute is not a gross intrusion into the federal domain, it must bow to superior federal policy); *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941) (Court inferred intent to preempt from the dominance of the federal interest in foreign affairs, the supremacy of national power in foreign affairs and the federal regulation of the field).[25]

The Court also should hold that application of state law would frustrate the liability scheme of the Convention, thereby creating a direct conflict with the objective and purpose of the treaty. As the Fifth Circuit in *Potter* correctly held, the Convention's intended goal of uniformity in the field of international air transportation would be frustrated if

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[25] The field of international or interstate air transportation is traditionally an area regulated by federal law. *See United States v. Helsley*, 615 F.2d 784, 786 (9th Cir. 1979); *see also Northwest Airlines, Inc. v. County of Kent, Michigan*, 510 U.S. 355, 356 (1994); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992).

passengers could invoke state law to govern claims arising in the course of Convention transportation (98 F.3d at 885), and thus subject a carrier to the potentially differing laws of the 50 states of the United States and the some 120 nation states that are a party to the Convention. *See also Lockerbie*, 928 F.2d at 1274-75.

Accordingly, proper application of federal preemption criteria requires that the Convention trump state law. To permit recourse to state law under Tseng's circumstances would thwart the intent and objectives of the Convention in an area of such self-evident international interest as security of air transportation. *See* ATA Br. 18-21; US Br. in support of petition for writ of *certiorari* at 9. The international stature of the treaty and its far reaching implications, considerations overlooked by Tseng, confirm that the field which the Convention occupies supersedes state law.

III

RATIFICATION OF MONTREAL PROTOCOL NO. 4 WILL FURTHER, BUT NOT RESOLVE, THE ISSUE OF EXCLUSIVITY

Article 24, as amended by Montreal Protocol No. 4,[26] is consistent with Article 24 of the Warsaw Convention. Both provisions direct a claimant to seek relief under Article 17, 18 or 19 and preempt application of state law where the claim arises in the course of international air transportation. *See* Pet. Br. 38; US Br. 26-28; ATA Br. 10-11; IATA Br. 4. Unfortunately, however, unless the Court upholds exclusivity in this case, the future ratification of Montreal Protocol No. 4 will not foreclose the debate. *Compare* US Br. 28-29. As both parties and *amici* recognize, Montreal Protocol No. 4 leaves

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[26] International Civil Aviation Organization, 2 *Documents of the International Conference on Air Law, Montreal*, ICAO Doc. 9154-LC/174-2 (1975).

unchanged the text of Article 17.[27] Thus, trial courts still will be faced with the argument proffered by Tseng—that the Convention is inapplicable when an injury arising in the course of international transportation is not caused by an "accident" within the meaning of Article 17. (R. Br. 19-20). Tseng's focus on an Article 17 "accident" as a prerequisite to application of the Convention demonstrates a disputed issue that will remain even after the anticipated ratification of Montreal Protocol No. 4.

While Article 17 is unamended, Article 24's introductory clause has been amended to substitute "[i]n the cases covered by Article 17" with "[i]n the carriage of passengers and baggage." The Protocol, however, still retains the "however founded" phrase. The lower courts have been addressing (and would continue to address) the argument that the Convention is not exclusive on the basis that the claimant's action has been "founded" on state law. *See* Pet. Br. 21-23.

Amici hope and expect that "the proposed change in the introductory clause to [Article 24 will make it] abundantly clear that the Convention's 'conditions' for, and 'limits' on, liability [will] apply to *all* suits by passengers for personal injuries arising in the course of international air travel . . . ." US Br. 27; *see also* ATA Br. 10. However, because Montreal Protocol No. 4 leaves unamended Article 17 and only amends, in part, the language of Article 24, the Court should resolve the issue of exclusivity, which will continue to be a recurring issue in the interpretation and application of the Warsaw Convention.

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[27] It is somewhat noteworthy that Article 25 is modified in Montreal Protocol No. 4. Reference to state law as a means of defining "wilful misconduct" has been deleted, thereby lending further support for the lower court's conclusion that Article 25 was intended to be a "subset" of Article 17. *Tseng*, 122 F.3d at 104.

CONCLUSION

The judiciary must uphold the terms and conditions of a treaty. The Court should uphold the express language of Articles 17 and 24, concur with the holding of the House of Lords in *Abnett*, enforce uniformity and find that the Convention provides the exclusive basis for carrier liability. Because Tseng's personal injury claim against EL AL indisputably arose in the course of Warsaw Convention transportation and because her claim fails to meet the conditions precedent to recovery under Article 17, the Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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Dated: August 28, 1998